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The Grand Jury: Representative or Elite?

By JON VAN DYKE*

The grand jury, an ancient protection against governmental abuse of power, became the subject of sharp controversy during the Nixon and Ford administrations because its secret and powerful processes had been manipulated by government lawyers conducting dragnet-type investigations of political activists and radical organizations.¹ With the outbreak of the Watergate scandal in 1972, the positive role of this ancient body was observed once again when the government's highest officials were obliged to appear before a body of citizens who had the power to hand down indictments upon finding probable cause that crimes had been committed.

Thus, even though the power of the grand jury has been abused, it may still provide a needed shield against governmental oppression in some situations. When confronted with governmental overreaching, the grand jury has the power to refuse to indict persons that the government wishes to prosecute.² But perhaps more important, the grand jury also has the power to investigate the activities of governmental agencies in a uniquely probing and thorough manner. This independent panel of citizens has more power to investigate and uncover abuses of power than

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1. See, e.g., L. CLARK, *THE GRAND JURY: THE USE AND ABUSE OF POLITICAL POWER* (1975); Donner & Cerruti, *The Grand Jury Network*, *THE NATION* Jan. 3, 1972, at 5-20; Charles Goodell, *Where Did The Grand Jury Go?*, *HARPERS MAGAZINE* May 1973, at 14, reprinted in *GOODELL, POLITICAL PRISONERS IN AMERICA* 233-54 (1973). See also Harris, *Annals of the Law (Taking the Fifth)*, (pts. 1-3) *THE NEW YORKER*, Apr. 5, 1976, at 44, Apr. 12, 1976, at 43, Apr. 19, 1976, at 42.

2. A typical example is the case of investigative reporter Leslie Whitten. Whitten, an associate of columnist Jack Anderson, was accused in late January 1973 of possessing documents stolen from the Bureau of Indian Affairs. The District of Columbia Grand Jury found the government's evidence to be inadequate and refused to return an indictment, thereby forcing the government to abandon its prosecution. *San Francisco Chronicle*, Feb. 16, 1973, at 10, col. 5.

any other governmental body simply because the grand jurors are independent citizens who fade anonymously back into the community when their job is done; as private citizens, they need not fear future job reprisals, or face other pressures that inevitably occur when the investigators are part of the system being investigated. Special Prosecutor Leon Jaworski, in his July 1974 brief before the Supreme Court in *United States v. Nixon*,³ demanding President Nixon's tapes and defending the action of the grand jury in naming Nixon a co-conspirator, described the grand jury as "this body of citizens, randomly selected, beholden neither to court nor to prosecutor, trusted historically to protect the individual against unwarranted government charges, but sworn to ferret out criminality by the exalted and powerful as well as by the humble and weak"⁴

The grand jury is thus an institution of great power, and a potential force for good that can easily be abused through harrassing investigations and unjustified indictments. This article focuses on the methods by which grand jurors are selected, because the composition of the grand jury will inevitably influence which topics the grand jurors choose to investigate and which persons they indict.

History of the Grand Jury

The formal separation of the grand jury from the trial jury occurred in 1350 when the English Parliament passed a statute forbidding grand jurors from sitting on the trial juries of defendants they had indicted.⁵ Thereafter, when one of the king's many traveling justices arrived to hear the disputes of a community, the sheriff would pick twelve men from the immediate surrounding community to serve as local jurors; he would then select an additional group of twenty-four men, usually knights, from a larger area to serve as an accusing body for the entire county. These twenty-four men, after eliminating one member to preclude the possibility of a deadlock, began investigating incidents throughout the county under the title of "le graunde inquest," and quickly took over the entire burden of filing indictments.⁶

The form of the grand jury was thus established at an early date, but over 300 years passed before the independence of the grand jury

3. 418 U.S. 683 (1974).

4. N.Y. Times, July 2, 1974, at 20, col. 6.

5. 25 Edw. 3, c. 3 (1350).

6. F. POLLACK & F. MAITLAND, HISTORY OF ENGLISH LAW 646-47 (2d ed. 1898, reissued 1968); 3 REEVES, HISTORY OF THE ENGLISH LAW 133 (3d ed. 1814).

was finally recognized. In 1681, eleven years after the trial jury's independence was established in *Bushell's Case*,⁷ the grand jury of London refused to return an indictment against Stephen Colledge, who was accused of treason. After hearing the prosecutions' witnesses and questioning them in private, the grand jurors returned the bill presented by the prosecutor with the word "ignoramus"⁸ written on its back. The royal authorities then presented the same evidence before the Oxford grand jury which returned the indictment, apparently not sharing the politics of its counterpart in London.⁹ The principle that a grand jury could stand between the king and the accused was nonetheless established and spread quickly throughout England, as well as to the American Colonies.

Independent grand juries played an important role in the years before the American Revolution.¹⁰ During the early debates in the Massachusetts Legislature over the ratification of the Constitution, before the Bill of Rights had been written and presented to the states, Abraham Holmes complained:

[T]here is no provision made in the Constitution to prevent the attorney-general from filing information against any person, whether he is indicted by the grand jury or not; in consequence of which the most innocent person in the commonwealth may be taken by virtue of a warrant issued in consequence of such information¹¹

Because of this fear, when the Bill of Rights was prepared, the protection of the grand jury was provided for in the proposed fifth amendment as a bulwark against governmental oppression, and was accepted as part of the Bill of Rights without debate.

The Supreme Court's Treatment of the Grand Jury

The United States Supreme Court has not been a careful guardian of the protections offered by the grand jury. The first time the Court

7. 124 Eng. Rep. 1006 (C.P. 1670).

8. The word means "we are ignorant" or "we ignore it" in Latin. BLACK'S LAW DICTIONARY 881 (4th ed. 1968).

9. The Trial of Stephen Colledge, at Oxford, for High Treason, [1681] 8 How. St. Tr. 550. See also Proceedings at the Old-Bailey against Anthony Earl of Shaftsbury, [1681] 8 How. St. Tr. 759.

10. For a discussion of the development of the grand jury in the American colonies during the seventeenth and early eighteenth centuries see Van Dyke & Wolinsky, *Quadra v. Superior Court of San Francisco: A Challenge to the Composition of the San Francisco Grand Jury*, 27 HASTINGS L.J. 565, 592-93 (1976).

11. 2 ELLIOT'S DEBATES 110 (2d ed. 1881).

considered the grand jury in any detail was in *Hurtado v. California*,¹² a case challenging an amendment to a provision of the California Constitution¹³ that had eliminated the necessity for a grand jury indictment by allowing an accused to be brought to trial after an information filed by the district attorney and an examination before a magistrate. The Supreme Court tested the California change by asking whether the information and its accompanying preliminary hearing satisfied the requirements of the due process of law guaranteed to all Americans by the fourteenth amendment. The Court concluded that the minimum requisites of liberty and justice were in fact preserved by a preliminary hearing in which the district attorney was obliged to establish probable guilt before a neutral magistrate.¹⁴ In certain respects the accused was given more protection in a preliminary hearing than by a grand jury indictment because although the accused may appear at the hearing with counsel and cross-examine the government's witnesses, accused persons are barred from grand jury deliberations.¹⁵ Justice John M. Harlan, writing the single dissenting opinion, complained that an essential element of liberty was being sacrificed by this process:

In the secrecy of the investigations by grand juries, the weak and helpless—proscribed, perhaps, because of their race, or pursued by an unreasoning public clamor—have found, and will continue to find, security against official oppression, the cruelty of mobs, the machinations of falsehood, and the malevolence of private persons who would use the machinery of the law to bring ruin upon their personal enemies.¹⁶

But this plaintive cry was lost in the rush for innovation, and many of the western states followed California's lead in eliminating the requirement of grand jury indictments.¹⁷

Between 1953 and 1969, the period when Earl Warren was chief justice, the Supreme Court ruled that the due process clause of the fourteenth amendment incorporated most of the Bill of Rights, and that the states must as a result provide almost all the protections of the Bill of

12. 110 U.S. 516 (1884).

13. CAL. CONST. art. I, § 8.

14. 110 U.S. at 537-38.

15. For a more complete discussion see Alexander & Portman, *Grand Jury Indictment Versus Prosecution by Information: An Equal Protection-Due Process Issue*, 25 HASTINGS L.J. 997 (1974). See also Justice Mosk's concurring opinion in *Johnson v. Superior Court*, 15 Cal. 3d 248, 255-70, 539 P.2d 792, 796, 124 Cal. Rptr. 32, 36 (1975).

16. 110 U.S. at 554-55.

17. See Appendix *infra*.

Rights to their citizens.¹⁸ The grand jury is, however, one of only two guarantees in the Bill of Rights that have been left out of this process of incorporation,¹⁹ apparently because preliminary hearings have been acknowledged to provide effective protection for defendants, and because the grand jury's secret processes are viewed with increasing suspicion.²⁰ The grand jury may in theory be a body of citizens designed to protect people from being falsely accused; but because the grand jury meets in secret, and because the potential defendant has no right to appear or refute the government's case, it provides an uncertain protection. The British, in fact, found the grand jury to be totally unnecessary and discarded the institution in 1933.²¹

In the United States, grand juries are still active bodies, but their main activity has gradually shifted from returning criminal indictments to investigating major governmental scandals and elaborate criminal conspiracies.²² The Supreme Court has permitted grand juries to conduct probes without specific goals;²³ indeed grand juries seem increasingly to be searching blindly for evils. It is this activity that has caused most of the recent controversy.

The Political Implications of Grand Jury Power and Prosecutorial Manipulation

The romantic image of the grand jury is that of a body of citizens who gather together to investigate the crimes of the community. In fact, grand jurors all too often follow the prosecutor's lead completely and return indictments whenever the district attorney requests them to do so.²⁴ They meet behind closed doors, are carefully guided by the prosecutor, and have almost unlimited power to demand evidence. The potential for abuse is therefore great, and during the Nixon Administration a graphic demonstration of abuse was provided for us.

Under the direction of Robert Mardian, the assistant attorney general in charge of the Justice Department's Internal Security Division,

18. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145 (1968).

19. The other guarantee is the seventh amendment right to jury trial in all civil matters involving more than twenty dollars.

20. See note 15 *supra*.

21. The Administration of Justice Act of 1933, 23 & 24 Geo. 5, c. 36, § 1.

22. See Van Dyke & Wolinsky, *Quadra v. Superior Court of the City and County of San Francisco: A Challenge to the Composition of the San Francisco Grand Jury*, 27 HASTINGS L.J. 565, 582-84 (1976).

23. *Hale v. Henkel*, 201 U.S. 43 (1906).

24. See, e.g., Morse, *A Survey of the Grand Jury System* (pts. 1-3), 10 ORE. L. REV. 101, 217, 295 (1931).

and Guy Goodwin, head of the division's Special Litigation Section, federal grand juries were impaneled throughout the country to investigate a wide range of political and radical activity. These investigations were not primarily aimed at solving particular crimes, but were instead part of a massive governmental effort to keep close track of radicals and to trap them into revealing information about their political activities. Using the grand jury's virtually unlimited power to issue subpoenas, and the accompanying power to jail for contempt any recalcitrant witnesses, the Justice Department was able to harass numerous persons who committed no crimes but did pose a threat to the Nixon Republicans because of their ideas.

In October and November of 1970, five young political activists in Los Angeles were subpoenaed by a federal jury in Tucson, Arizona, and were asked questions like:

Tell the grand jury every place you went after you returned to your apartment from Cuba, every city you visited, with whom and by what means of transportation you traveled and who you visited at all of the places you went during the times of your travels after you left your apartment in Ann Arbor, Michigan, in May 1970.²⁵

After refusing to answer these questions, all five were held in contempt and spent the next four months in jail until the term of that grand jury expired.²⁶ The Justice Department was thus using federal grand juries to supplement the work of the Federal Bureau of Investigation, asking subpoenaed witnesses those questions that they had refused to answer to the bureau, and jailing them if they did not cooperate.

In a similar incident, Donald and Patricia Grumbles, a young couple in their early twenties, were held in contempt for refusing to answer questions before a federal grand jury concerning raids in 1970 and 1971 on government files in Media, Pennsylvania, and Camden and Bridgeton, New Jersey. They were freed from prison in March 1973 after serving for nineteen and fourteen months respectively. The grand jury, although technically still in session until March 1973, had in fact been inactive for many months. Finally, a federal judge ruled that the lengthy incarceration was punitive and ordered their release.²⁷ Later that month, Senator Edward M. Kennedy denounced the government's use of special grand juries to investigate radical activity, calling them "kangaroo grand juries" and stating that they were "a dangerous

25. Donner & Cerruti, *The Grand Jury Network*, THE NATION Jan. 3, 1972, at 5, 6.

26. *Id.* at 7.

27. N.Y. Times, Mar. 5, 1973, at 33, col. 7 (city ed.).

modern form of star chamber secret inquisition that is trampling the rights of American citizens from coast to coast."²⁸ During that same year, Justice William O. Douglas wrote, "It is, indeed, common knowledge that the grand jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive."²⁹ These grand jury inquisitions, although created during Richard Nixon's presidency, did not end with his forced resignation. The federal government has continued to use investigative grand juries as a vehicle to subpoena political activists and imprison them for contempt if they fail to respond to wide-ranging requests for information on an almost endless list of subjects. Some writers have maintained that gay women and movement attorneys have been singled out for particular attention by federal grand juries.³⁰

State grand juries also have almost unlimited power to obtain information, to harrass witnesses, and to indict, and they too have sometimes abused this power. Examples of this abuse are not difficult to chronicle. Sol Price, a San Diego County grand juror, resigned in disgust in 1966 because that grand jury was returning indictments without any rigorous investigations of the assertions made by the district attorney.³¹ Edison Uno, a San Francisco County grand juror who decided to take his job of municipal investigator seriously, was virtually barred from the county jail one Saturday morning in 1970 because the jailers had never heard of a grand juror coming unannounced to inspect.³² Several grand jurors resigned from the Marin County, California, grand jury in 1971 because their fellow jurors returned indictments based on virtually no evidence against lawyer Stephen Bingham and six prison inmates after George Jackson, the Black Panther prison activist, was killed at San Quentin State Prison.³³ Finally, a member of the 1971 Los Angeles County grand jury has complained that the jurors were unable to ask any questions of the witnesses themselves; written questions they submitted to the district attorney were frequently unasked because the questions might hurt the prosecution's case; grand jurors

28. N.Y. Times, Mar. 14, 1973, at 11, col. 1 (city ed.).

29. United States v. Mara, 410 U.S. 19, 23 (1973) (dissenting opinion).

30. See, e.g., Avery, *New Wave of Grand Juries Harasses Women*, GUILD NOTES, May 1975, at 3; Conyers, *Grand Juries: The American Inquisition*, RAMPARTS, Aug.-Sept. 1975, at 14; Solowey, *The Grand Jury: Making Trouble for Movement Lawyers?*, JURIS DOCTOR, Mar. 1976, at 36.

31. Interview with Sol Price, July 7, 1971.

32. Interview with Edison Uno, Feb. 5, 1975.

33. See *Judging the Grand Jury*, TIME Feb. 7, 1972, at 59-60.

were frequently given off-the-record evidence that would not be admissible in trial; exhibits were loosely handled; and it was suggested that only if the grand jury were given an independent legal advisor unconnected with the district attorney's office could it really function as an independent body.³⁴

Selecting the Grand Jury

The only way that we can guarantee that grand jury abuses such as those outlined above do not continue to occur is to insure that membership on our grand juries accurately reflects the composition of the population at large. Grand juries composed only of elite and influential citizens are particularly vulnerable to governmental abuse; it is unlikely that such juries may be safely trusted to represent the interests of less powerful groups in society.

When the grand jury first became a body separate and distinct from the trial jury, those selected to serve as grand jurors were wealthier and of a higher social class than their trial jury counterparts because their jurisdiction was broader and their potential power was greater.³⁵ This tradition remains intact, and, although the statutes in most states say that grand jurors are to be selected in the same manner as trial jurors, substantial differences nonetheless frequently exist in practice and result.³⁶ About a dozen states still consciously impanel blue-ribbon grand juries and give these grand juries extensive investigating power that is more important than their indicting role.

Various justifications are given for this practice. Some commentators and judges have argued that because many grand juries perform both a watch-dog function (supervising governmental agencies) and an investigative function (probing into abuses of power) the grand jurors must be sophisticated and well educated; otherwise they could be fooled by the officials they are supposed to investigate.³⁷ Another common justification given for the predominance of affluent and retired professionals on grand juries is that the time required of grand jurors is so

34. Young, *The Grand Jury Needs an Impartial Arbiter*, L.A. Times, May 8, 1972, pt. II, at 7, col. 3.

35. See text accompanying note 6 *supra*.

36. See text accompanying notes 40-42 *infra*.

37. See, e.g., Petersen, *The California Grand Jury System: A Review and Suggestions for Reform*, 5 PAC. L.J. 1 (1974) [hereinafter cited as Petersen]. See also *People v. Hoiland*, 22 Cal. App. 3d 530, 99 Cal. Rptr. 523, 529 (1971).

great that only persons who are to some extent independently wealthy can perform the required task adequately.³⁸

Neither of these justifications are persuasive, however, because both problems could be easily solved by modest increases in the expenditures provided for grand juries. In order to allow all persons to respond to this civic responsibility when called upon, the pay provided to grand jurors should be raised; in those jurisdictions where grand jurors are required to serve for a year or more, the pay should be raised above that given to trial jurors, perhaps to fifty or sixty dollars a day.

Similarly, any problem created by grand jurors who have trouble understanding the economic intricacies of local government can be solved by permitting each grand jury to hire its own attorney and investigator to assist the grand jurors in conducting its investigations.³⁹ Of course, the grand jurors themselves must be permitted to select both the attorney and the investigator, who must be totally independent of the local governments subject to investigation. With such staff assistance, a randomly selected body of citizens can conduct a sophisticated review of their local governmental agencies. These alternatives that would be preferable to the blue-ribbon grand juries are still impeded in many states.

Selecting Local Grand Juries

The statutes of many states provide that grand jurors are to be chosen in the same manner as trial jurors, but in actual practice, potential grand jurors are frequently screened carefully by the judges so that those finally selected are in fact an elite group. In Colorado, for instance, a random list of from 50 to 75 names of potential jurors is produced by a computer, but these people are then carefully interviewed by a judge and the district attorney, and the two of them select the twelve grand jurors.⁴⁰ In St. Louis, Missouri, 2,000 names are taken off the trial jury wheel; this list is then divided into forty lists of 50 names. Each of the forty lists is then sent to one of the local judges who determines who on the list is eligible for grand jury service. The law requires that at least 600 names in total be deemed eligible. Those

38. See, e.g., Deposition of The Honorable Robert Drewes, May 8, 1975, at 33, *Quadra v. Superior Court*, Civil No. C-72-1689 (N.D. Cal., filed Sept. 20, 1972).

39. See Mei Kato Bickner, *The Grand Jury . . . A Layman's Assessment . . .*, 48 CAL. ST. B.J. 660, 737 (1973).

40. Interview with A. Erickson, Jury Commissioner, Denver County, Colorado, July 3, 1972.

eligible are then put into a wheel from which 75 names are drawn. From this list, the presiding judge selects twelve grand jurors and two alternates to serve for a term of ten weeks.⁴¹ Those who become grand jurors have thus been carefully screened for their acceptability.

In Baltimore, Maryland, 200 names are selected at random from the voter registration list and these people are asked whether they can spare the time required for service. A random selection is then made from those willing to serve. The grand jury meets every day for four months, reviewing most serious criminal matters that pass through the courts and conducting some investigations of local agencies. The only persons who can spare the time to sit on the grand jury are dependent spouses, retired persons, and those rare employees who are released with pay by their employer for the four-month period.⁴²

Some states do truly try to select grand jurors randomly. In Oregon, all prospective grand and trial jurors are selected from the voter registration list, and summoned together for their four weeks of service. At the courthouse, they are interviewed by a clerk and if found acceptable, are sworn in as jurors. Most of these persons become trial jurors, but seven names are randomly selected by the jury commissioner to serve as grand jurors.⁴³

Blue-Ribbon Panels

Some states make no pretense whatsoever that their grand juries are randomly selected; instead, these states consciously seek to impanel only the "most qualified" citizens. Among the states that attempt to select only blue-ribbon grand juries are California, New York and Texas, three of our nation's most populous states. Although this practice has been defended,⁴⁴ these states frequently are left with grand juries filled with the friends and political cronies of the judges and other office holders.

Connecticut provides a striking example of this result. The function of the grand jury in Connecticut is to return indictments in capital

41. Interview with John T. Barrett, Jury Commissioner, St. Louis, Missouri, Mar. 30, 1973.

42. Interview with Dulany Foster, Chief Judge of the Baltimore, Maryland, Superior Court, Aug. 14, 1972.

43. Statement by Michael D. Hall, Circuit Court Administrator and Jury Commissioner, Multnomah County (Portland), Oregon, July 11, 1972.

44. See text accompanying notes 37-38 *supra* & 57-58 *infra*.

cases. On rare occasions a grand jury is impaneled to conduct an investigation, but the body's investigatory duties are limited and irregular. This limited role is fortunate because this state's grand juries do not in any way represent the population of the state. They are hand picked by the county sheriffs who act with absolutely no guidelines of any sort. Until the 1940's, Connecticut had allowed each town to elect its grand jurors, who were considered town officials, but this democratic practice was abolished throughout the state; now the sheriff acts alone,⁴⁵ much like the royal sheriffs of pre-colonial England.⁴⁶

An illustration of the grand jury selection process in New Haven was provided in 1970 just prior to the murder trial of Black Panther leaders Bobby Seale and Ericka Huggins. Seale's attorney, Charles Garry, examined the 73 year-old sheriff of New Haven at length,⁴⁷ and Sheriff Slavin conceded that he simply used his "own judgment" and tended to select people he knew and liked.⁴⁸

The sheriff had met grand juror Harrison Sipes at a Democratic convention. William Hine was a Democratic town chairman and had been a friend of the sheriff for about forty years. Both are members of the Elks club. Sheriff Slavin had known Mrs. Abbie Creem's husband for thirty years. Edwin Joy was also a close friend. William Bratten, another of the grand jurors, was recommended by one of the sheriff's friends. Then there was Fred Colley, who was the sheriff's barber and Joseph Shea, the owner of the barber shop. Finally, Arthur Jaqua, who served as an alternate, had previously worked for the sheriff as a jailor.⁴⁹

Others on that eighteen member grand jury were rounded up in an even more haphazard fashion. When asked how William Gallagher, a lawyer, became a grand juror, the sheriff responded:

I found him out in the hallway, I guess. We needed somebody to substitute that morning, because one of the fellows couldn't come in. So we got him to go on the Grand Jury. . . . I had to have a Grand Jury. There was a fellow that was sick.⁵⁰

Six of the eighteen grand jurors and two alternates had served as grand jurors before, because it was Sheriff Slavin's custom to use his acquaint-

45. Letter from Connecticut State Senator Joseph I. Lieberman, to Jon Van Dyke, Jan. 31, 1972.

46. See text accompanying note 6 *supra*.

47. Illustrative excerpts from this examination are printed in WHITE JUSTICE 266-88 (S. Blackburn ed. 1971).

48. *Id.* at 269.

49. *Id.* at 272-87.

50. Transcript of Hearing on Motion to Quash Indictment at 81-82, State v. Seale, Civil No. 15644, (New Haven County Conn. Super. Ct., filed Oct. 30, 1970).

ances over and over again. Eleven of the twenty were fifty years old or over.⁵¹

This body, theoretically impaneled to represent the community's conscience and to act as a shield against governmental oppression, indicted Bobby Seale and Ericka Huggins on the basis of the uncorroborated testimony of a government informer and caused them to remain in jail for two years without bail; they were finally released on May 25, 1971, after a trial jury could not reach a unanimous verdict of any sort and the trial judge ruled that a second impartial jury could not be impaneled.⁵²

In 1973, this system of personal selection of grand jurors by local sheriffs was held constitutional by the Supreme Court of Connecticut.⁵³ In 1975, the United States Court of Appeals for the Second Circuit upheld this decision.⁵⁴

California

California's prestigious grand juries are primarily investigative bodies, with broad responsibility to examine all county activities. They also consider criminal indictments that the district attorney feels are either politically sensitive or require some measure of secrecy. Most shootings by police officers, for instance, are presented to a grand jury, with the result that if no indictment is handed down, the public may never learn the details of the incident.⁵⁵ Sexual crimes are also usually referred to the grand jury. But over 95 percent of all California felonies charged are brought by information and a preliminary hearing rather than by grand jury indictment,⁵⁶ and the grand jurors spend most of their time, meeting once or twice a week for a year, investigating local government activities.

In most of the state's fifty-eight counties, all grand jurors are nominated by the superior court judges. In Santa Clara County, each

51. *Id.*

52. WHITE JUSTICE 288 (S. Blackburn ed. 1971).

53. *State v. Cobbs*, 164 Conn. 402, 324 A.2d 234, *cert. denied*, 414 U.S. 861 (1973).

54. *Cobbs v. Robinson*, 528 F.2d 1331 (2d Cir. 1975).

55. The Santa Clara County District Attorney, Louis P. Bergna, has said that he normally submits police shootings to the grand jury. Memo from Louis P. Bergna to the Santa Clara County Board of Supervisors, Apr. 26, 1974.

56. Petersen, *supra* note 37, at 8, *citing* BUREAU OF CRIMINAL STATISTICS, CALIFORNIA DEPARTMENT OF JUSTICE, FELONY DEFENDANTS DISPOSED OF IN CALIFORNIA COURTS, 5 (1971).

of the twenty-four judges nominates one grand juror and the six senior judges are permitted an additional nominee. Nineteen persons are then drawn by lot from the thirty nominees. Santa Clara District Attorney Louis P. Bergna told a state legislative committee in 1968 that "[i]t's not democratic . . . Grand jurors, I think are more apt to be members of the local country club than they are of the local union [but] what's democratic about the way judges are chosen?"⁵⁷ Santa Clara County Judge George Barnett defended the blue-ribbon aspects of the grand jury by saying, "We need leader types, we don't want a passive grand jury. . . . It takes 12 to return an indictment, what if we drew only revolutionaries, pot smokers, who would vote against indictments?"⁵⁸

In Los Angeles County, which because of its size is allowed a grand jury of twenty-three, each judge nominates two persons, and then the complete list of over 200 nominees is circulated among the judges and made available for public inspection. A police investigation is made of all the prospective jurors, and then the judges vote on the nominees. The thirty-four persons receiving the most votes constitute the final list, and the county clerk draws twenty-three names at random from this list.⁵⁹ By contrast, rural Nevada County, in the foothills of the Sierras, has only one superior court judge who nominates thirty persons by himself; nineteen names are then drawn by lot from this list to serve as grand jurors. In 1972, Harold Berliner, the district attorney in Nevada County, protested the judge's selections because ten of the grand jurors were connected with the real estate industry, and only six were wage earners or spouses of wage earners. Berliner had been fighting against overdevelopment for some time and feared he would be unable to obtain indictments against despoilers of the environment from such a grand jury. He was unable, however, to obtain any relief from the courts.⁶⁰

Studies made of selected counties in the state reveal that the result of this system of hand-picking grand jurors is a significant underrepresentation of blue-collar workers, women, the young, and minority groups on California grand juries.

57. Cohen, *The grand jury—who needs it?*, Town Crier (Los Altos), Oct. 3, 1973, at 16, col. 1.

58. *Id.*

59. Comment, *Grand Jury Discrimination and the Mexican American*, 5 LOYOLA L. REV. (Los Angeles) 87, 92 (1972).

60. *Berliner v. Super. Ct.*, No. 13434 (Cal. Ct. App., Mar. 6, 1972), *petition for hearing denied* (Sup. Ct., Mar. 30, 1972).

Alameda County

Peter Sperlich, Professor of Political Science at the Berkeley campus of the University of California and an expert on statistical studies of both trial juries and grand juries,⁶¹ studied the composition of the 1969-72 grand juries in Alameda County, and submitted the following breakdown of their demographic characteristics as part of a jury challenge in the trial of Wendy Yoshimura:⁶²

Characteristic	Pop. of Alameda County	Grand Jury Panels				
		1969	1970	1971	1972	all four**
Age						
21-29 years*	25.8%	0 %	2.3%	0 %	2.6%	1.2%
30 + years	74.2	100	97.7	100	97.4	98.8
Occupation						
Blue Collar*	36.8%	7.0%	3.1%	3.6%	0 %	3.7%
White Collar	63.2	93.0	96.9	96.4	100	96.3
Income (Family)						
to \$9,999*	42.3%	11.1%	3.0%	3.8%	12.1%	7.8%
\$10,000 & more	57.7	88.9	97.0	96.2	87.9	92.2
Gender						
Female*	51.0%	31.8%	39.1%	47.8%	40.0%	39.0%
Male	49.0	68.2	60.9	52.2	60.0	61.0

* Test Group

** Arithmetic Average of the Four Separate Panels

Since 1972, the situation in Alameda County has improved very little. The nineteen members of the 1974-75 grand jury included only one black, two Spanish surnamed persons, seven women, and nobody under forty. All were either retired, not regularly employed, or employed in a flexible job with hours that could be manipulated at their convenience. Only one salaried wage earner, a gardener for the East Bay Regional Park District, was selected as a grand juror, but he had to resign almost immediately because his employer refused to continue his normal salary during those days of grand jury service, and the gardener could not survive on the ten dollars a day that the county pays its grand jurors.⁶³

61. See, e.g., Sperlich & Jaspovice, *Grand Juries, Grand Jurors, and the Constitution*, 1 HAST. CONST. L.Q. 63 (1974); Sperlich & Jaspovice, *Statistical Decision Theory and the Selection of Grand Jurors: Testing for Discrimination in a Single Panel*, 2 HAST. CONST. L.Q. 75 (1975).

62. Declaration of Peter Sperlich, Mar. 24, 1976, *People v. Yoshimura*, No. 52904, (Super. Ct., Alameda County, California, filed Apr. 12, 1972).

63. Interviews with Joseph Grodin, foreperson of the 1974-75 Alameda County grand jury, July 11, 1974, Aug. 17, 1974, Aug. 30, 1974. For other statistics on Alameda County grand juries see Comment, *The Civil Petitioner's Rights to Representative Grand Juries and a Statistical Method of Showing Discrimination in Jury Selection Cases Generally*, 20 U.C.L.A.L. REV. 581 (1973).

Marin County

Superior Court Judge Vernon Stoll ruled in 1974 that the 1971 Marin County Grand Jury had been selected unconstitutionally and "did not assure a fair representation" of "the Blacks, the Latin Americans, the blue-collar working class and the young . . ."⁶⁴ This decision, however, was reversed by the California Court of Appeal which concluded that Judge Stoll had erred in looking only to the result of the selection process, even though the fact that the judges exercise unbridled discretion in selecting grand jurors gives them an opportunity to discriminate.⁶⁵ The Marin County Grand Jury is still selected by the judges upon recommendations from civic organizations, and older, affluent whites continue to dominate its composition.⁶⁶

Riverside County

A study of persons nominated to serve as grand jurors by the superior court judges of Riverside County between 1968 and 1972 revealed that only 4.9 percent had an annual income of less than \$6,000 (compared to 30.2 percent of the population of the county), that only 2.4 percent were under thirty (compared to 19.8 percent of the population of the county over twenty-one), and that only 32.5 percent had not gone to college for at least one year (compared to 73.9 percent in the county).⁶⁷

San Diego County

A study of grand jurors in San Diego county between 1962 and 1971 showed that every one of the 136 employed grand jurors had white

64. *People v. Bingham*, No. 4094 (Marin County, Cal. Super. Ct., Jan. 17, 1974).

65. *People v. Pinell*, 43 Cal. App. 3d 627, 117 Cal. Rptr. 913 (1974). Judge Stoll's approach of examining the result alone in situations involving the exercise of personal discretion in selecting grand jurors is supported by substantial authority. See *Quadra v. Superior Court*, 403 F. Supp. 486 (N.D. Cal. 1975). An earlier opinion in *Quadra* appears at 378 F. Supp. 605 (N.D. Cal. 1974).

66. The grand jury empaneled in 1972, for instance, contained only one blue-collar worker, only one person under thirty, no blacks, and only one person of Hispanic background. Declaration of Ruth Astle, Apr. 29, 1974, *People v. Baeza*, No. 4960 (Marin County, Cal. Super. Ct., filed Jan. 10, 1974).

67. This demographic survey was conducted by Ruth Astle, David Light, and Jamie Kalven for two cases: *People v. Lawton*, No. 9138 (Riverside County, Cal. Super. Ct., filed June 7, 1971); *People v. Gardiner*, No. 9485 (Riverside County, Cal. Super. Ct., filed Oct. 7, 1971). During the five year period involved, 352 persons were nominated as grand jurors. The investigators were able to obtain the income information from 226 of the nominees, the age information from 255 of the nominees, and the education information from 249 of the nominees.

collar jobs and that of the 55 grand jurors who were retired, only one—a maintenance painter—had been a blue-collar worker before retirement. None of the 191 grand jurors selected during that ten-year period was under thirty, and between 1968 and 1971, 85.1 percent of the grand jurors were forty-five or over, even though only 49.9 percent of the over-twenty-one population of the county was over forty-four years old.⁶⁸

San Francisco

The grand juries of San Francisco have been under attack for some time. After protracted litigation, United States District Court Judge Charles B. Renfrew ruled that "persistent underrepresentation" of non-whites and women was "sufficiently substantial to establish a *prima facie* case of unconstitutional exclusion."⁶⁹ Following this decision, the San Francisco superior court judges, who had previously split the grand jury functions between two grand juries, one that passed on criminal indictments and a second that performed the civil investigative function, voted to select both of these grand juries from the voter registration list. After 1977, grand jurors will be randomly selected from a combined list formed from the voter registration list and the list of holders of California driver's licenses.⁷⁰

San Joaquin County

Located in the heart of California's central valley, this county uses a hybrid form of selection, with the superior court judges making some nominations, and then adding randomly selected names from the voter registration list. Many of the randomly selected persons request to be excused, however, so that the judges' nominees still comprise about half of the people who become grand jurors. A study of the thirty persons who reached the final stage in the years 1970 to 1973 revealed that only 2.2 percent were under thirty (compared to 26.8 percent of the population over eighteen), only 9.8 percent earned less than \$6,000 annually (compared to 26.3 percent of the adult population), and only 13.9 percent were blue-collar workers (compared

68. Committee of the County Bar, *Report of the Grand Jury Committee, San Diego County Bar Association*, 9 SAN DIEGO L. REV. 145, 150-53 (1972).

69. *Quadra v. Superior Court*, 403 F. Supp. 486 (N.D. Cal. 1975). An earlier opinion in this case appears at 378 F. Supp. 605 (N.D. Cal. 1974).

70. The plaintiffs' briefs and a fuller description of the *Quadra* litigation can be found in Van Dyke & Wolinsky, *Quadra v. Superior Court of the City and County of San Francisco: A Challenge to the Composition of the San Francisco Grand Jury*, 27 HASTINGS L.J. 565 (1976).

to 33.6 percent of the employed population).⁷¹ For the 1974-75 grand jury, the judges nominated twenty-five persons; another fifty were selected randomly from the voter list. Of those nominated by the judges, only 8.3 percent earned less than \$6,000 yearly, only 14.3 percent were blue-collar workers, and none were under thirty or of Hispanic origin. San Joaquin County Superior Court Judge Martin E. Rothenberg has since ruled that the United States Constitution requires that the judges affirmatively seek out jurors who will constitute a fair cross section of the community, and that the results in San Joaquin County indicate that they have not fulfilled this duty.⁷²

Santa Clara County

A survey of the approximately thirty persons who reached the final selection stage in Santa Clara County during the years 1970 to 1974 revealed a similar pattern. Only 2 percent were under thirty (compared to 27 percent of the population over twenty-one), only 4 percent were blue-collar workers (compared to 41 percent of the employed population), and only 23 percent had not gone to college (compared to 63 percent of the adult population).⁷³

In 1974, an indictment issued by the Santa Clara Grand Jury was quashed after the defendant, a woman, was able to demonstrate that from 1969 through 1973, an average of only 12 percent of the persons selected to be grand jurors were women, although women made up over 50 percent of the county's population.⁷⁴ Superior Court Judge Robert W. Carter found that "the 1973 Santa Clara Grand Jury selection and its ultimate composition demonstrates a statistical discriminatory result rather than the product of discriminatory design."⁷⁵ Judge Carter ordered the

71. Demographic survey prepared by Rosemond Davis, Sept. 16, 1975, *People v. Castro*, No. 26416 (San Joaquin County, Cal. Super. Ct., filed Dec. 10, 1974). Of the 119 persons who reached the final selection stage, age and income data was obtained for 92, and occupation information was obtained for 108.

72. *Id.*

73. Demographic survey prepared by Ruth Astle and Jamie Kalven for *People v. Moreno*, No. 58659 (Santa Clara County, Cal. Super. Ct., filed Aug. 27, 1974). Of the 147 persons involved, the investigators obtained age and education information for 120 and occupation information for 137.

74. Table appended to Decision, *People v. Peraza*, No. 57546 (Santa Clara, Cal. Super. Ct., filed Jan. 29, 1974). Peraza and Navarrette, his codefendant, were indicted by the same grand jury but only Navarrette, a woman, was held to have standing to raise the constitutional objection. Peraza, described in the opinion as "a 42-year-old male of Mexican-American heritage," was held to have no standing to raise the issue of the underrepresentation of women on the grand jury because he was not a member of the excluded class. Decision, *id.* at 4-5. *But see Taylor v. Louisiana*, 419 U.S. 522 (1975).

75. *Id.* at 6.

indictment quashed, "since the thrust of a tenable constitutional challenge is directed to a substantial under-representation of a cognizable class over a substantial period of time by a member of that class."⁷⁶

Santa Cruz County

An examination of the finalists in Santa Cruz County during the years 1969 and 1973 revealed that not one had an annual salary of less than \$6,000 (compared to 30.6 percent of the county's population), only 2.5 percent were under thirty (compared to 19 percent of the population); only 8.5 percent were blue-collar workers (compared to 49.6 percent of the employed population); only 18.9 percent had not gone to college (compared to 68.8 percent of the adult population), and only 18.9 percent were women (compared to 53.8 percent of the adult population).⁷⁷

* * *

Because of the increasing litigation on grand jury composition, a number of counties is experimenting with random grand juries.⁷⁸ San Francisco's random selection for 1976-77 is the first such attempt by a major urban county. Most counties are, however, reluctant to abandon the hand-selected blue-ribbon approach. For the most part, the affluent white male judges still pick their acquaintances, and hence most grand juries in California are dominated by affluent, white males.⁷⁹

New York

The grand juries of the most populous state in the east are selected

76. *Id.* The opinion goes on to note, however, that "obviously corrective action has been taken in that the 1974 Santa Clara County Grand Jury is composed of a majority of women, including a female foreman." *Id.*

77. Demographic survey prepared by Ruth Astle, David Light, and Jamie Kalven for *People v. Solano*, No. 52387, (Santa Cruz County, Cal. Super. Ct., filed Jan. 23, 1974). Of the 143 nominees, income data was obtained for 106, age information for 120, occupation data for 118, and education information for 122. The sex of all 143 was known.

78. See, e.g., Petersen, *supra* note 37, at 7 (reporting that Butte, Merced, and Ventura Counties select grand juries randomly); Thomson, *Grand Jury Reform—Coming One Way or Another*, 6 CALIF. J. 443, 444 (1975) (stating that Sacramento, Butte, and El Dorado counties have at least some randomness built into their selection systems).

79. The underrepresentation of Native Americans and persons of Hispanic origin on California grand juries is perhaps even greater than that of other minority groups. A study by the United States Commission on Civil Rights focusing on the 1957 to 1968 grand juries selected in California counties indicates that the underrepresentation of Spanish surnamed persons ranged from 48% to 94%; underrepresentation of Native Americans was 82% and 100% in two counties studied. U.S. COMM'N ON CIVIL RIGHTS, *MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST* (1970).

through a conscious and sophisticated attempt to gather together the most established people of the community. A roster of eligible persons is maintained, and each year a small number of persons between thirty-five and sixty-five are selected from the trial jury lists and are invited to join the list of persons eligible for grand jury service. Those who respond affirmatively—perhaps a third of those receiving letters—are fingerprinted and subjected to a rigorous police investigation. If they pass, they are eligible to become grand jurors.

A challenge to this selection process was started in 1964 by persons who had been held in contempt for refusing to answer questions about the riots that occurred in Harlem that year. They established that the 1964 grand jury list was different from the population of Manhattan in the following dramatic respects:⁸⁰

Demographic Group	Percentage on Grand Jury List	Percent of Manhattan Population Over Twenty-One (1960 Census)
Blacks	1.7	24
Puerto Ricans	0.3	12
Blue-Collar Workers	1.2	47

Despite the virtually total exclusion of non-whites and the poor, and the absolute exclusion of the young, the United States Court of Appeals for the Second Circuit refused to rule that this procedure was unconstitutional.⁸¹ The opinion was written by Judge Irving R. Kaufman, the chairman for many years of the federal judiciary's Committee on the Operation of the Jury System and a person who has in other contexts advocated the position that the jury should represent a cross section of the community.⁸² The United States Supreme Court refused to review the decision.⁸³

Another example of the elite composition of New York grand juries is the panel assembled to consider the indictments against the New York Black Panthers in 1969. Of the twenty-seven persons drawn from the grand jury list and then questioned, twenty-three were male; their average age was fifty-eight and the youngest was forty-nine; their aver-

80. *United States ex rel. Chestnut v. Criminal Ct. of City of N.Y.*, 442 F.2d 611, 614 (2d Cir. 1971). The blue-collar percentage comes from the 1966 grand jury list.

81. *Id.*

82. *Hearing on Federal Jury Selection Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. 251 (1967).

83. *Chestnut v. Criminal Ct. of the City of N.Y.*, 404 U.S. 856 (1971).

age income was \$23,875; and their average net worth was an astounding \$187,792. All had previously sat on grand juries, and one woman stated that she had been sitting on grand juries for forty years. Only three had blue-collar jobs.⁸⁴

In connection with a later challenge of the New York grand jury selection procedure,⁸⁵ an examination by the Queens County Legal Aid Society of the 1972 Queens County grand jury list revealed that only 13.1 percent of the 1,500 persons on the list were women, and that only 18.5 percent were blue-collar workers compared to a county-wide percentage of 39.6. Although the race could not be identified readily by looking at the questionnaires, an examination of the addresses of the grand jurors indicated that blacks were probably underrepresented by at least 50 percent.⁸⁶ While that challenge to the grand jury selection procedure was pending, the Legal Aid Society obtained an affidavit from one grand juror, Monique Golden, who stated that in her own grand jury and in two others that she had observed, only two women and no blacks or Puerto Ricans could be found out of a total of sixty-nine jurors. "The typical grand juror," she said, "and there clearly was, in my experience, a typical grand juror—was white, male, above average in socio-economic terms . . . and tended to be elderly (a great many of the grand jurors were retired)."⁸⁷ A subsequent examination of the 1971 grand jury list found 4.4 percent non-whites, compared to 11.6 percent non-white among the population over twenty-one in Queens County.⁸⁸

In 1974, the New York legislature passed a bill that would have changed the selection of grand jurors to a random method, but the bill was vetoed by Governor Malcom Wilson, after heavy lobbying by the New York State District Attorneys Association, a group representing all of the prosecutors in the state.⁸⁹

Texas

Texas provides a final example of a selection procedure designed to

84. Lefcourt, *Voir Dire of New York Grand Jury*, 28 THE NAT. LAWYERS GUILD PRACTITIONER 78, 85 (Summer 1969).

85. *Johnson v. Durant*, No. 73C.1159-EN (E.D.N.Y., filed Aug. 3, 1973).

86. Affidavit by sociologist Eric Single, Sept. 27, 1973, *Johnson v. Durant*, No. 73C.1159-EN (E.D.N.Y., filed Aug. 3, 1973).

87. Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, Oct. 9, 1973, at 18, *Johnson v. Durant*, No. 73C.1159-EN (E.D.N.Y., filed Aug. 3, 1973).

88. *Id.* at 19.

89. N.Y. Times, June 23, 1974, at 1, col. 2.

insure that only the elite are chosen as grand jurors. The presiding judge of each county in Texas appoints five jury commissioners whose sole task is to produce a short list of sixteen to twenty persons, the first twelve of whom usually become grand jurors. Because the selection of grand jurors in Texas has been frequently challenged,⁹⁰ the jury commissioners are told that a racial balance is required, and they do try to include token numbers of non-whites. In Bexar County, which includes San Antonio, six grand juries containing a total of seventy-two jurors are impaneled each year; between 1959 and 1968, the number of Chicanos selected each year out of the seventy-two ranged from a low of seven to a high of ten. This narrow range indicates a conscious effort to stay within a narrow range, which is far below the Chicano population of the county—about 40 percent.⁹¹

A more recent survey, made of grand jurors who served in Harris County (Houston) between the years 1969 and 1972, revealed that only 22 percent of the grand jurors were women (compared to 51 percent of the county population), only 10 percent were under thirty-five (compared to 24 percent in the county), only 4 percent made less than \$10,000 annually (compared to 47 percent in the county), only 11 percent had not gone to college (compared to 72 percent of the adult population), and only 3 percent were of Hispanic origin (compared to 11 percent in the county).⁹² Federal District Judge John V. Singleton, Jr. described this as a "startling socioeconomic, racial, sexual, and educational imbalance"⁹³ and stated that in his personal judgment, the system of personally selecting grand jurors should be declared unconstitutional.⁹⁴

Local superior court judges are largely responsible for this imbalance. The jury commissioners are of course carefully chosen by the presiding judge, but even so the judge can manipulate the list of nominees once it is submitted. Judge Jerome Chamberlain, Jr., the presiding judge of Dallas County in 1970, moved a twenty-four-year-old

90. See, e.g., *Cassell v. Texas*, 339 U.S. 282 (1950); *Akins v. Texas*, 325 U.S. 398 (1945); *Smith v. Texas*, 311 U.S. 128 (1940); *Thomas v. Texas*, 212 U.S. 278 (1909).

91. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1970 CENSUS OF POPULATION, vol. 1, pt. 45, § 1, at 907 (Table 119).

92. *Dumont v. Estelle*, 377 F. Supp. 374, 386 (S.D. Tex. 1974). Out of 271 grand jurors, 156 responded to the survey.

93. *Id.* at 378.

94. *Id.* at 379. For a sociological study of the Harris County grand jury selection process see Carp, *The Harris County Grand Jury—A Case Study*, 12 HOUST. L. REV. 90 (1974).

Chicano activist whom the jury commissioners had placed in position six on the list down to number seventeen, moved a black attorney who had been number eleven down to number sixteen, and downgraded a woman from number thirteen to number fourteen.⁹⁵ In explaining his action, Judge Chamberlain stated, "I thought [the young Chicano] was too young and did not think he accurately reflected the beliefs and opinions held by the majority of the people in Dallas County." And as to the woman:

Well, I wanted a fair representation of individuals in the County and there were already three women that were selected and named above them, so probably I changed their positions so that it wouldn't be a predominance of women or not so many on the Grand Jury.

This action was challenged by a person subsequently indicted by the grand jury, but the reviewing Texas court did not find any constitutional infirmities in the selection scheme.⁹⁶

Selection of Federal Grand Jurors

The federal selection system is similar in conception to the Oregon system,⁹⁷ but all prospective grand jurors are questioned by a judge, and frequently also by a United States attorney, who inevitably exercises some discretion in deciding whether a juror should be allowed to remain on the grand jury. A description of the impaneling of a federal grand jury that occurred in San Francisco on January 4, 1972, provides an indication of how the process works.⁹⁸ This particular impaneling was for a normal federal grand jury which sits for three months and considers federal indictments. It was a typical selection process in all respects.

The process started much earlier when questionnaires were sent to all persons on the "master wheel." Those found to be qualified were moved to the "qualified wheel," and from this qualified group eighty-seven persons were sent summonses to report for grand jury duty. Eighteen of the eighty-seven were excused prior to the day they were required to report for duty, and six did not respond in any way. The rest reported at 10 a.m. in one of the larger courtrooms where they were met by Judge Robert H. Schnacke and United States Attorney James

95. *In re Becker*, No. 43-632 (Dallas County, Tex. Super. Ct., Nov. 13, 1972).

96. *Id.*

97. See text accompanying note 43 *supra*.

98. The description of the events mentioned in this section is based upon personal observations.

Browning. Judge Schnacke conducted all the questioning but he consulted occasionally with Mr. Browning during the session. About nineteen of the group who came to the courthouse requested at this late date to be excused, and it is the treatment of these requests that is instructive.

Judge Schnacke was reluctant to grant excuses to persons with white-collar occupations and backgrounds but readily excused blue-collar employees. Two white males about fifty years old, a buyer for an import-export business and an employee of a shipping firm, requested excuses because of their businesses. Both were granted delays, but their names were put back into the qualified wheel, and they were told they would have to serve later. A third white male, a fifty-five year-old vice president and senior art director of an advertising firm, requested an excuse because of his business and was told he would have to serve. He was subsequently named deputy foreman of the grand jury.

In sharp contrast to this treatment of the white-collar workers, the three blue-collar employees who requested to be excused because of their occupations were excused without being questioned, and were not put back into the qualified wheel. A white male in his early thirties who stated he was a laborer working on an hourly scale, and that he would not be paid if he did not work, was excused immediately. A white male about forty who said he was a laborer in a union was excused without further questioning. A third white male between forty and forty-five did not ask to be excused at first; his name was drawn out of the wheel, and he took a temporary seat on the twenty-three member panel. He then said, in answer to Judge Schnacke's question, that he was a truck driver. The judge immediately asked whether he would prefer to be excused. The truck driver responded that he would lose the twenty or twenty-five dollars that he usually makes each day if he had to serve on the jury. Judge Schnacke excused him, without mentioning that grand jurors receive twenty dollars per day (recently raised to twenty-five dollars) plus mileage for each day of service.

Another blue-collar worker, a Chicano employed as a foreman at a refinery, was selected in the first twenty-three to be seated, and he also was asked specifically by Judge Schnacke if he would be paid while serving on the jury. None of the white-collar employees was asked that question by the judge.

The judge also showed a readiness to excuse persons who differed slightly from the white, middle-class, middle-aged ideal if they presented

even the slightest basis for being excused. A black woman about forty years old told Judge Schnacke when he asked for excuses that she had a slight hearing difficulty. She added, however, that she had served on a municipal court jury in Oakland during the previous year without any difficulty. Although she did not specifically ask to be excused, Judge Schnacke released her from jury duty. Similarly, a young white male about twenty-eight years old asked to be excused because he lived in Mountain View, about thirty miles south of the courthouse. Judge Schnacke allowed the excuse, saying that, although he did not think Mountain View was far enough away to justify an excuse on the ground of distance, he would give the young man the benefit of the doubt.

Again by contrast, the judge did not encourage any of the white, middle-aged, middle class, jurors to request excuses. A white middle-aged woman told the court that her husband was a police officer, and that her son was a guard for the federal government. Judge Schnacke did not even ask her if she could still be fair and impartial, and he allowed her to remain on the grand jury.

Finally, the judge selected to be foreman of the grand jury a sixty-seven year-old white male who is president of a wholesale grocery firm, and then, as mentioned above, appointed as deputy foreman a fifty-five year-old white male advertising executive. Judge Schnacke's selection of two older white males with business backgrounds to head the grand jury seemed to institutionalize the disproportion that had resulted from his previous decisions regarding excuses.

Of the twenty-three jurors finally selected, only seven were women, only one was a black, only one was Chicano, and only one was Asian. Seventeen of the jurors were employed in white-collar occupations, three were housewives, and only three were blue-collar workers. According to my estimates of their ages, only two were under thirty, and another two were between thirty and thirty-five.

This type of grand jury is all too typical. The defendants in a 1975 case in the Northern District of California⁹⁹ examined the questionnaires filled out by all the grand jurors selected for twenty-three different grand juries between 1969 and early 1975, and came up with the following statistical percentages:

99. *United States v. Rafofsky*, No. CR-74-687 OJC (N.D. Cal., filed Oct. 23, 1974).

	1970 Census (Over 18)	Adjusted 1970 Census (Over 18) ¹⁰⁰	23 Grand Juries 1969-75 ¹⁰¹	Rate of Error: Over (+) or Under (-) Representation
Race				
White				
Anglo-European	76.8	74.6	86.6	+16.1
Spanish Surnamed	11.2	13.8	6.3	-54.3
Nonwhite				
Black	6.5	6.3	4.4	-30.2
Asian	4.8	4.7	2.5	-46.8
Native American	0.5	0.5	0.2	-60.0
Occupation				
White Collar	57.1		74.0	+29.6
Blue Collar	42.9		26.0	-39.4
	(Of those employed)		(Only the 396 employed grand jurors are included)	
<hr/>				
	1970 Census (Over 18)		23 Grand Juries 1969-75 ¹⁰²	Rate of Error: Over (+) or Under (-) Representation
Education				
Less than High School	34.2		9.1	-73.4
A High School Diploma	32.5		36.4	+12.0
At Least Some College	33.3		54.5	+63.7
Sex				
Male	48.5		58.2	+20.0
Female	51.5		41.8	-18.8
Age				
18-29	29.9		14.6	-51.2
10 & over	70.1		85.4 ¹⁰³	+21.8

Federal grand juries tend to underrepresent the young, the poor and the non-white because they start out with the voter registration list, which underrepresents these groups; because these lists are stored for four years at a time, thus discriminating against the most mobile of our population—i.e., the young, the poor and the non-white; and because many judges, like Judge Schnacke, seem eager to excuse members of

100. Defendant's Memorandum of Points and Authorities in Support of His Motion to Challenge the Federal Grand Jury, Feb. 11, 1975, United States v. Rafofsky, No. CR-74-687 OJC (N.D. Cal., filed Oct. 23, 1974). The census figures are adjusted to reflect a recomputation by the Census Bureau of the Spanish surnamed figure. *Id.* at 4. See also San Francisco Chronicle, May 11, 1974, at 1, col. 1.

101. Sixty persons whose race could not be determined are eliminated from these figures. Defendant's Memorandum of Points and Authorities in Support of His Motion to Challenge the Federal Grand Jury, Feb. 11, 1975, at 4, United States v. Rafofsky, No. CR-74-687 OJC (N.D. Cal., filed Oct. 23, 1974).

102. Seven persons whose education could not be determined have been eliminated from these figures. *Id.* at 5.

103. Five persons whose age could not be determined have been eliminated from these figures. *Id.* at 4.

these groups.¹⁰⁴ Many federal grand juries do not, therefore, represent the community, but instead represent only the most established and powerful sectors of our society.

Conclusion

Grand juries have been given enormous power in our legal system: the power to demand information from anybody,¹⁰⁵ the power to investigate anything, the power to indict any of us. We have given this awesome power to a body of citizens rather than to a panel of experts because we distrust bureaucracies and feel that persons in power tend to abuse that power. We are better protected by an anonymous group of citizens who cannot use their power to pursue any personal ambitions and who will drift back into society after their term is over.

If some sectors of the community, however, are systematically underrepresented on our grand juries, then the grand jury's activities will be skewed. The interests of all will not necessarily be served. The body can be an instrument for partisan decisionmaking or be subject to governmental manipulation.

The United States Supreme Court has repeated several times that the grand jury must be "a body truly representative of the community,"¹⁰⁶ but that goal is not being met in most of the courts of our country, as the statistics presented here illustrate. If the grand jury is once again to act as a bulwark against governmental tyranny, we must adopt random selection systems to protect against all official manipulation of grand jury composition, and must take more seriously the responsibility of ensuring the true representativeness of the grand jury.

104. These topics are explored in detail in my forthcoming book on jury selection, tentatively titled, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*.

105. See *United States v. Nixon*, 418 U.S. 683 (1974); *Branzburg v. Hayes*, 408 U.S. 665 (1973).

106. *Carter v. Jury Commission*, 396 U.S. 320, 330 (1970); *Smith v. Texas*, 311 U.S. 128, 130 (1940).

Appendix

Summary of Selection Procedures and Duties of Grand Juries

State	Grand Jury Selection Process	Size of Grand Jury	Number of Grand Jurors Needed to Indict	Scope of Grand Jury Activities	Is a Grand Jury Indict- ment essential for all fel- ony prosecutions unless waived by the accused?
Federal Courts	Random selection from registered voters followed by questioning by a judge and the United States Attorney.	23	12	Criminal indictments and investigation into organized crime and conspiratorial criminal activity.	Yes (all with a potential sentence of more than a year)
Alabama	Discretion, exercised by a 3-member citizen jury commission.	18	12	Criminal indictments and investigations of local governmental affairs.	Yes
Alaska	Random selection from the lists of actual voters, tax rolls, and lists of trapping, hunting, and fishing licenses.	12-18	Majority	Criminal indictments and investigations of local governmental affairs.	Yes
Arizona	Randomly selected from registered voter lists then questioned and selected by judges. Statute authorizes statewide grand juries.	12-16 (16 in Mariposa County (Phoenix))	9	Criminal indictments.	No
Arkansas	Discretion exercised by a 3-12 member citizen commission appointed by a circuit judge.	16	12	Criminal indictments and investigations of local governmental affairs.	Yes

State	Grand Jury Selection Process	Size of Grand Jury	Number of Grand Jurors Needed to Indict	Scope of Grand Jury Activities	Is a Grand Jury Indict- ment essential for all fel- ony prosecutions unless waived by the accused?
California	Discretion exercised by the Superior Court judges, except in Butte, Merced, San Francisco, and Ventura Counties, where the selection is random from the list of registered voters, and in Sacramento and San Joaquin Counties where some discretion and some random selection is used.	19 in all counties except Los Angeles where it is 23.	12/19-14/23	Investigates local governmental affairs and considers indictments in fewer than 5 percent of all felony matters. Serves for one year.	No
Colorado	Random selection from the registered voters list, drivers' license lists and city directories, as 23 followed by questioning by the judge and district attorney. Statewide grand juries can be assembled.	Usually 12, occasionally as large as 23	9/12-12/23	Investigates controversial crimes, like police shootings and governmental corruption.	No
Connecticut	Discretion exercised by the county sheriff.	18	12	All crimes with sentence of death or life imprisonment, occasional investigations.	Yes (but only for crimes with a potential sentence of death or life imprisonment).
Delaware	Discretion, exercised by jury commissioners who pick grand jurors according to geographical districts.	10-15	7/10-9/15	Criminal indictments, investigations; serves for one year.	Yes (with certain constitutional and statutory exceptions).

District of Columbia	Random selection from the list of registered voters, followed by questioning by a judge and the United States Attorney.	23	12	Criminal indictments. Serves at least 2 months. Frequently 9 or 10 are operating at once.	Yes (all crimes with a potential sentence of a year or more).
Florida	Discretion, exercised by county commissions or jury commission (appointed by governor). Statewide grand juries can be impaneled.	15-18	12	Criminal indictments, investigations of county offices.	Capital offenses only
Georgia	Discretion, exercised by commissioners, appointed by judge.	16-23	Majority	Criminal indictments, investigations of local governmental affairs, inspections; sets salary for certain jobs.	Yes
Hawaii	Random selection from registered voters list which may be supplemented by lists of taxpayers or holders of driver's licenses.	18-23	12	Criminal indictments.	No
Idaho	Random selection from registered voters list, utility list, and driver's license list.	16	12	Public offenses.	No
Illinois	Usually, random selection from the registered voters list, followed by questioning about the time involved.	23 (20 on supplemental panel)	12	Criminal indictments and investigations of official misconduct.	Yes

State	Grand Jury Selection Process	Size of Grand Jury	Number of Grand Jurors Needed to Indict	Scope of Grand Jury Activities	Is a Grand Jury Indict- ment essential for all fel- ony prosecutions unless waived by the accused?
Indiana	Random selection from the registered voters list, followed by questioning by a judge and prosecutor for bias and time.	6	5	Criminal indictments (major felony cases).	No
Iowa	Random selection from the list of actual voters.	7	5	Criminal indictments, investi- gations of prisons, conduct of public officials, highways.	Yes
Kansas	Random selection from the list of registered voters and/or census list.	15	12	All public offenses.	No
Kentucky	Discretion, exercised by a 3-member citizen jury commission appointed by a judge.	12	9	Criminal indictments.	Yes
Louisiana	Discretion, exercised by citizen jury commission.	12	9	Criminal indictments.	Capital offenses only
Maine	Random selection from voter registration lists followed by questioning by a judge and the district attorney.	13-23	12	Criminal indictments. In Cumberland County (Portland), the grand jury serves for one year and meets for five to ten days three times a year.	Yes

Maryland	Random selection from voter registration lists, screened to see who can spare the time.	23	12	Criminal indictments. Also inspects government agencies. Meets every day for four months.	No
Massachusetts	35 names are randomly drawn from the trial jury list, which is assembled by discretion, then a judge selects 23 persons.	23	12	Criminal indictments.	Yes
Michigan	Random selection from the list of registered voters.	13-17 Also 1 person (judge) grand juries	9	Criminal indictments (infrequently) and investigations.	No
Minnesota	Random selection from the list of registered voters (separate list maintained).	16-23	16	Criminal indictments, investigations of prisons and public officials.	No
Mississippi	Discretion, exercised by the local boards of supervisors.	15-20	12	Criminal indictments and investigations of local governmental affairs.	No
Missouri	Randomly selected names are screened carefully by the judges who make the final selection.	12	9	Criminal indictments, investigations, inspections, inquiries into government fiscal matters.	No
Montana	Random selection from tax rolls.	11	10	Criminal indictments, investigations, public officials, prisons.	No

State	Grand Jury Selection Process	Size of Grand Jury	Number of Grand Jurors Needed to Indict	Scope of Grand Jury Activities	Is a Grand Jury Indict- ment essential for all fel- ony prosecutions unless waived by the accused?
Nebraska	Random selection of 40 names from the list of actual or registered voters, and from that list of 40, 16 are picked by the judge and jury commissioner.	16	12	Criminal indictments, county jail.	No
Nevada	36 persons are nominated by the county commissioners and one judge. 17 are then drawn by lot.	17	12	Criminal indictments and investigations of local governmental affairs.	No
New Hampshire	Random selection from the trial jury list, which is assembled by the discretion of town officials.	23	12	Criminal indictments and investigations of subversive activities. Meets about four days every 2-3 months.	Yes
New Jersey	Random selection from the list of registered voters. Statute authorizes statewide grand juries.	23	12	Criminal indictments, investi- gations.	Yes
New Mexico	Random selection from the voter registration list followed by questioning by a judge.	12	8	Criminal indictments, investi- gations. In Bernalillo County (Albuquerque), grand juries meet once a week for a six-month term. Elsewhere, they are called infrequently.	No

New York	Specially selected from persons who have been qualified as trial jurors and who pass a police investigation.	16-23	12	Criminal indictments, investigations into prisons and misconduct of public officials. Serves for one month.	Yes
North Carolina	Discretion, exercised by a 3-member citizen jury commission, appointed by 3 local officials.	9	Majority	Criminal indictments, inspections.	Yes
North Dakota	Random selection from lists of actual voters and holders of drivers' licenses.	8-11	6	Criminal indictments, prisons, public officials. Only rarely assembled.	No
Ohio	Random selection from the registered voters list followed by questioning.	9	7	Criminal indictments.	Yes
Oklahoma	Varies by county.	12	9	Criminal indictments and investigations of local governmental affairs. Can be called by petition of citizens.	No
Oregon	Random selection from the list of registered voters.	7	5	Criminal indictments and investigations of public prisons and offices pertaining to courts of justice.	No
Pennsylvania	Selected from voter registration lists, and sometimes interviewed by jury clerk and jury master.	15-23	12	Criminal indictments and investigations.	Counties are free to abolish the indicting grand jury and many have done so.

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Rhode Island	Random selection from voter registration list followed by an interview. Statewide grand juries are authorized.	13-23	13	Criminal indictments.	Only for offenses punishable by death or life imprisonment.
South Carolina	Discretion, exercised by a jury commission composed of civil servants.	18	12	Criminal indictments.	Yes
South Dakota	Random selection from the registered voters list.	8	5	Criminal indictments, investi- gations of governmental misconduct.	No
Tennessee	Randomly selected from the trial jury lists which are compiled by jury commissioners without guidelines. Same person may serve as foreman for several or many years.	13	12	Criminal indictments and investigations of prisons, elections, and governmental affairs.	Yes
Texas	Discretion exercised by citizen jury commissioners, appointed by a judge.	12	9	Criminal indictments, investigations.	Yes
Utah	Random selection from voter registration list; potential grand jurors are screened by the judges.	7	5	Criminal indictments, investi- gations of public prisons, wilful and corrupt misconduct of public officials.	No

Vermont	Jury commissioners select names.	18	12	Criminal indictments.	Only for offenses punishable by death or life imprisonment.
Virginia	Judges choose names.	5-7	4	Criminal indictments.	Yes
Washington	Random selection from voter registration list.	12-18; 17-18 in King County (Seattle)	3/4	Criminal indictments and investigations of governmental affairs.	No
West Virginia	Discretion, exercised by a 2-member citizen jury commission representing the 2 major political parties.	16	12	Criminal indictments.	Yes
Wisconsin	Names selected by jury commissioners and then screened by the judges. In Milwaukee County, random selection from the registered voters list.	17	12	Criminal indictments.	No
Wyoming	Random selection from the voter registration list. State-wide grand juries can be assembled.	12-16	9	Criminal indictments, inspections, investigations.	No

